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In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77-658

ASARCO Incorporated (formerly The American Smelting and Refining Company) *Appellant*,

vs.

MONTANA DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellee*.

Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

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vs.

MONTANA DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellee*.

Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

Appellant moves the Court to dismiss the appeal herein on the following grounds:

I.

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT SINCE THE APPELLANT HAS NOT PROPERLY RAISED THE VALIDITY OF ANY STATUTE OF THE STATE OF MONTANA OR OF ANY ADMINISTRATIVE ACT OF APPELLEE AS BEING REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

A. THE CONSTITUTIONAL ISSUES WERE NOT RAISED BEFORE THE PROPER ADMINISTRATIVE AGENCY, WHICH IS THE STATE TAX APPEAL BOARD, NOR WERE THEY RAISED BEFORE THE MONTANA DISTRICT COURT OR THE MONTANA SUPREME COURT BUT WERE ABANDONED AFTER THE HEARING BEFORE APPELLEE.

To come within the jurisdiction of this Court under 28 U.S.C. Sec. 1257(2) a party must make explicit and timely insistence in the state court that the state statute as applied, is repugnant to the federal constitution. See *Stalge vs. State of Ohio*, 366 U.S. 259, 81 S.Ct. 1076 (1961), *Rohr Aircraft Corp. vs. County of San Diego*, 362 U.S. 628, 80 S.Ct. 1050 (1960).

A review of the record will indicate such explicit and timely insistence of constitutional questions was not made by the Appellant. At first glance, it appears that in the protest filed by the Appellant with the Appellee in April of 1973 constitutional questions may have been raised; however a careful review of the record indicates that the issues were abandoned after a hearing was held pursuant to Section 84-1508.1 R.C.M. 1947, on the deficiency assessment. This hearing under Montana law, as interpreted by the Montana Supreme Court, was only an opportunity for the taxpayer to request a review of the administrative procedure used to calculate the assessment and to allow the taxpayer to present evidence in support of its tax calculation. See *W. R. Grace and Co. vs. Department of Revenue of the State of Montana*, . . . Mont. . . ., 567 P.2d 913 (1977). After the hearing, the Appellee denied the Appellant's request that the deficiency be vacated; the Appellee then filed an appeal to the State Tax Appeal Board (Board) under the Montana Administrative Procedure Act (Title 82, Chapter 42, R.C.M., 1947). The appeal to the Board is a trial de

novo; it is the record established at the Board which alone constitutes the record for purposes of any further appeal. Any judicial review of the findings by the Board, is limited solely to the record as made before the Board. *W. R. Grace* case, *ibid*, and Section 84-709.1 R.C.M. 1947 and Section 82-4216 R.C.M. 1947.

The record of the proceedings before the Board is devoid of any mention of constitutional matters. In appealing from an adverse decision of the Appellee, it was incumbent upon the Appellant to raise all questions including any question concerning the constitutionality of any statute or action of the Appellee, a copy of the brief of the Appellant and filed with the Board is attached as Appendix A, page 1a. In that brief the Appellant sets forth the issues on appeal, no mention is made of any constitutional questions. The Findings of Fact and Conclusions of Law submitted by the Appellant to the Board which were adopted in toto by the Board again contain no reference to any constitutional issue. See Appellant's Appendix A, page 39a.

At the hearing before the District Court on judicial review, again the Appellant did not raise any questions relating to the constitutionality of any statute or any action taken by the Appellee. Finally, when the matter was on appeal to the Supreme Court of Montana, no mention was made at any time by any party of any constitutional aspect of this proceeding. It was not until the Appellant's Petition for Rehearing that the constitutional issues mentioned in the initial petition were attempted to be reviewed.

Appellant contends that the Board and the State District Court proceeded to rule in Appellant's favor on statutory grounds and it was therefore unnecessary and improper for either the Board or the District Court to

consider the constitutional question. Appellant cites *State ex rel Hammon vs. Hager* 160 Mont. 391, 503 P.2d 52 (1972) in support of its position. However, that case and the others cited by Appellant clearly show the court in those cases refused to decide a constitutional issue actually brought before the court. In this case not only were the constitutional questions not properly raised before the Board but they were abandoned after the hearing before Appellee. (See discussion I (B) below). The simple fact is that neither the Board or the District Court decided the case on constitutional grounds, because none were presented.

Appellant also contends that the Supreme Court of Montana has ruled that a constitutional issue may be raised at any time, even in a petition for rehearing and must be considered by the court whenever raised. In support it cites *In Re Clark's Estate*, 105 Mont. 401, 74 P.2d. 401, (1937). That decision, if not specifically overruled, has been severally limited by more recent decisions of the Montana Supreme Court. The Montana Supreme Court approves the position that constitutional questions cannot be raised for the first time on appeal, quoting 11 AM JUR Constitutional Law as follows:

> "A person whose rights are invaded by an act of the legislature or of an administrative board must raise the objection at the earliest available opportunity and *exhaust the remedies* which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute." (Emphasis added) *Union Interchange Inc. vs. Allen*, 140 Mont. 227, 370 P.2d. 492, 495 (1962)
>
> *Johnson vs. Doran*, 167 Mont. 501, 540 P.2d 306 (1975).

The cases make it clear, for any issue including constitutional issues to be a proper subject of consideration for the Montana Supreme Court, they must be raised properly *throughout* the proceedings. A Petition for Rehearing is not the proper vehicle to raise for the first time in the Montana Supreme Court a constitutional issue. *Mares vs. Mares*, 60 Mont. 36, 199 Pac. 267 (1921) and Rule 34 Montana Rules Appellate Civil Procedure, (Appellee's Appendix *B*, p. 7a.) See also *Citizens National Bank of Cincinnati vs. Durr*, 257 U.S. 99, 42 S.Ct. 15 (1921).

The Appellant's remedy was to raise at the de novo proceedings before the State Tax Appeals Board and at the District Court and Montana Supreme Court the constitutional issues it now asserts. A matter which consists solely of interpretation of state statutes cannot now be twisted into a constitutional question to gain direct appeal access to the United States Supreme Court under 28 U.S.C. 1257(2).

B. CONSTITUTIONAL ISSUES IF AT ONE TIME RAISED BY THE APPELLANT AT THE HEARING BEFORE THE DEPARTMENT OF REVENUE, WERE SUBSEQUENTLY ABANDONED.

Appellant argues that its constitutional questions were properly raised at the earliest opportunity. The Appellant cites excerpts from its protest filed April 4, 1973 with the Department of Revenue (Appellee), page 64 of the Appendix of the Appellant.

In the protest, the Appellant refers to the status of the Multistate Tax Commission, and complains that Appellee failed to disclose to the Appellant, copies of the audits performed by the Multistate Tax Commission, upon which said assessments were based; therefore Appellant was unable to prepare a defense in this

matter. More specifically, in paragraph 8 of its protest, (Appellant's Appendix F, p. 67a) Appellant asserted that it was denied due process and equal protection by the failure of the Appellee to provide to the Appellant copies of the audits and work papers used by the Multistate Tax Commission which formed the basis of the deficiency assessments.

After listing the constitutional issues, the Appellant's protest then asked for alternative relief. It asked that:

> "WHEREFORE, having protested said deficiency assessments (Exhibit "A" hereto), your taxpayer prays that the Department of Revenue set aside all such deficiencies and interest thereon and find and determine that the taxpayer has properly reported for all of said years its income from sources within the State of Montana and properly paid a tax thereon and that the said purported and pretended deficiencies are null and void, OR, IN THE ALTERNATIVE, that the Department of Revenue: (a) order the Corporation Tax Bureau to furnish to the Taxpayer with all copies of all audits and other information upon which said deficiency assessments (Exhibit "A" hereto) were made, including, without limitation, all audits and other information furnished by the Multistate Tax Commission, and (b) that thereafter the Department of Revenue hold a hearing upon this protest and that at such time the taxpayer be allowed an opportunity to present additional evidence relating to its tax liability." Appellant's Appendix page 69a and 70a.

The alternative relief requested was granted, in that the documents requested by the Appellant including all the copies of the audits, work papers and narrative reports that were prepared by the Multistate Tax Commission auditors were supplied to the Appellant's counsel prior to the hearing before the Department. Some con-

stituted exhibits *F* and *G*, at the original hearing before the Department. (Transcript of hearing before the Department, October 1, 1973, page 2.) Once the documents had been provided, the hearing was held allowing the Appellant to present any additional evidence relating to its tax liability as it requested in the initial protest. Appellant proceeded to give testimony and introduce exhibits.

The relief prayed for by the Appellant in its protest being in the alternative, and the alternative relief having been granted, Appellant received what it requested in its protest before Appellee. Appellant thereafter abandoned its constitutional issues as they were not raised or mentioned again until the petition for rehearing filed with the Montana Supreme Court. The conclusion is inescapable that the constitutional issues were clearly abandoned.

C. THE QUESTIONS RAISED IN THE PETITION BEFORE THE DEPARTMENT OF REVENUE FRAME NO CLEARLY DEFINABLE CONSTITUTIONAL ISSUES.

The protest filed by the Appellant with the Department (Appellant's Appendix F, p. 64a) attempted to raise three constitutional issues but in fact did not raise any clearly definable constitutional question.

In Section 5 of the protest, page 66a of the Appellant's Appendix, reference is made to the fact that the audit was performed by employees of the Multistate Tax Commission and the Multistate Tax Compact may be void. What constitutional infirmity is created is never defined or enumerated. Nowhere is it asserted that the assessment is void as a violation of any constitutional provision. In Section 7 of the protest it is asserted that the corporation tax bureau acted illegally by delegating

to Multistate Tax Commission personnel the audit of appellant. This may be an issue of state law — delegation of Appellee's statutory authority — but this is not an issue of federal constitutionality.

In Section 8 of the protest, page 67a of the Appellant's Appendix, Appellant asserts that it was denied due process and equal protection because it could not ascertain what factors or matters were used in the proposed deficiency as that certain information had not been supplied as requested. That issue was laid to rest even prior to the initial hearing before the Appellee because the information was provided. (See argument I (B).

Finally, in Section 13 and 14 of the protest, an assertion is made that the assessment by the corporation tax bureau constitutes an illegal and unlawful burden on interstate commerce. It is necessary for a party to clearly set out a constitutional issue in a comprehensible manner so that it can be defined and discussed.

> "There are various ways in which the validity of a state statute may be drawn in question on the grounds that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention fo the state court *with fair precision and in due time.*" (Emphasis added) *Street vs. New York*, 394 U.S. 576, 584, 89 S.Ct. 1354 (1969).

The alleged burden on interstate commerce was not asserted with fair precision and in due time. In Section 13 of the protest (Appellant's Appendix, p. 69a) the allegation is made that Appellee attempted to allocate to Montana "by some formula, income or claimed income which should not properly be so allocated"; that there is no relationship between the property, payroll and sales of Appellant and the income attempted to be allocated

to Montana; and that there was an attempt to allocate not only unitary income but also income "of a dual or multiform nature and upon a basis which does not recognize the actual activities in furtherance of the business of the Taxpayer." Section 14 of the protest (Appellant's Appendix, p. 69a) then states that these attempts constitute "an illegal and unlawful burden upon interstate commerce." The wording of Section 13 of the protest makes it clear that the taxpayer did not know exactly upon what basis it could assert its unconstitutional claim; it had already asserted in the protest that it did not have the necessary information and facts as to how the Department had made its assessment. Section 13 and 14 constitute a general, "catch-all" assertion of unconstitutionality which says, in effect, that whatever method the Appellee used was unconstitutional.

As previously stated, Appellee furnished to the Appellant all of the necessary information for an understanding of the assessments. Having said information, having had a hearing and the Department of Revenue's order affirming the assessments, it was then incumbent upon the Appellee to clearly define the grounds upon which it might assert the unconstitutionality of the acts of the Appellee or of the Montana statutes. As already stated in this brief, these constitutional issues were abandoned and never reasserted or spelled out until an attempt was made to spell them out in the petition for rehearing in the Montana Supreme Court. Clearly, the Appellant can not now come forth and point to these vague, "catch-all" assertions of unconstitutionality in its original protest before Appellee as grounds upon which it can assert the unconstitutionality of a state statute as required under 28 U.S.C. 1257(2) for jurisdiction before this court.

D. VALIDITY OF SECTION 84-1503, R.C.M. 1947 HAS NOT BEEN QUESTIONED, THEREFORE APPELLEE HAS NOT ESTABLISHED PROPER GROUNDS FOR APPEAL UNDER 28 U.S.C. 1257(2).

A review of the jurisdictional statement in this matter indicates that what the Appellant is questioning is the validity of the acts taken by the Department of Revenue, and not the constitutionality of any statute. There has been no challenge to the constitutionality of Section 84-1503 R.C.M. 1947, or any statute in the Corporation Tax Act 84-1501 et seq. The question raised by the Appellant is whether or not Montana is taxing property beyond its jurisdiction. The constitutionality of that process can only be reviewed by this Court as a matter of discretion by a writ of certiorari and not as a matter of right under 28 U.S.C. 1257(2). *Anderson vs. Durr*, 257 U.S. 99, 42 S.Ct. 15 (1921), and *Dana vs. Dana*, 250 U.S. 220, 39 S.Ct. 449 (1919).

No particular statute has been challenged as unconstitutional in the Jurisdictional Statement, therefore, the appeal is not properly within 28 U.S.C. 1257(2). Appellant therefore urges that jurisdiction is not properly vested with this court and Appellee's Motion to Dismiss should be granted.

II.

APPELLANT HAS NOT PRESENTED ANY SUBSTANTIAL FEDERAL QUESTIONS WORTHY OF REVIEW BY THIS COURT.

Three questions relating to the proper function of state income tax laws are raised in Appellant's Jurisdictional Statement under the heading "(2) The Federal Questions", at page 10. Notwithstanding the position of Appellee that these issues were not properly raised in the

court below, and therefore are not subject to review at this stage, Appellee will discuss them to further demonstrate that this court should dismiss this appeal as raising no substantial federal questions worthy of review. U.S. Supreme Court Rule 16(2) (b).

A. THE ROLE OF THE MULTISTATE TAX COMMISSION.

This argument propounded by the Appellant is without the basis of any supporting citations. It is the Appellant's position that a serious constitutional issue is raised as to the validity of the Montana tax assessments if this court determines that the Multistate Tax Compact is illegal under the United States Constitution. *United States Steel Corp. vs. Multistate Tax Commission*, Dkt. No. 76-635, prob. juris. noted, 429 U.S. 1088 (1977).

There has never been any question throughout the entire case concerning the accuracy or voluntary nature of any of the audit information. The Appellant framed the issue on appeal as it relates to the Multistate Tax Commission audit in its brief in opposition to the motion of the Multistate Tax Commission to participate as amicus curiae before the Montana Supreme Court, as follows:

> "It is true that the audit which formed the basis of this litigation was conducted by the Multistate Tax Commission. But this fact has no bearing whatsoever on the issue on appeal herein. There never was any question in this case as to the audit information. Thus, the issue on appeal does not relate to the validity of the mechanics of the audit. Rather, the issue on the Department's appeal concerns the time at which the principals of UDITPA became effective in Montana. This issue, ASARCO submits, is solely and exclusively one of Montana law, in which the Multistate Tax Commission has not one

> bit of interest and with respect to which there is no need whatsoever for 'uniform interpretation and application by the member states' of the Multistate Tax Commission." Page 2. (The entire brief is set out in Appellee's Appendix C, p. 8a-17a.)

Although counsel believes this court will rule the Commission to be constitutionally valid, counsel does not see how the decision will affect the issues in this matter.

The status of the Commission does not affect the accuracy of the figures of the audit, the years of the audit, the voluntary nature of the accessibility of the books and records audited, or the Montana statutes in effect during the years in question.

It is true that the audit was conducted primarily by employees of the Commission; however, an auditor from the state of Montana participated in the audit and was a witness at the Department of Revenue hearing on the assessments. The testimony at the hearing made very clear that the audit was reviewed by the Corporation License Tax Division staff of the Department of Revenue; that the Corporation License Tax Division staff decided whether or not to accept the audit; and that the Corporation License Tax Division staff sets the policy which the commission auditors follow. This audit was accepted independently of the Multistate Tax Commission auditors who had no authority beyond the making of the audit. (Transcript of hearing before the Department, October 1, 1973, pages 48 and 49) The audit information was not utilized under any mandate or legal authority of the Commission, but rather the license tax provision of the Montana statute.

It is true that Mr. Theodore W. de Looze is co-counsel in this litigation. However, he was first appointed a special Assistant Attorney General for the State of Montana and did not become involved in this case until after the factual record was made before the State Tax Appeals Board and the matter decided by the Board. Mr. de Looze was associated with the Department counsel throughout the subsequent proceedings. The chief counsel for the Commission, Mr. William D. Dexter, appeared as amicus curiae, but only filed a brief in this matter because of the objection of the Appellant.

What can be the constitutional effect of compact invalidity? In view of the voluntary nature of the auditors access to Appellant's books and records, there can be no Fourth or Fifth Amendment constitutional questions. Appellant alludes merely to vague generalities and cannot point to what specific effect any constitutional invalidity of the commission would have on the case. Appellant has raised only political and personal considerations, i.e., the role of the western states and of certain individuals, which can have no bearing on the case.

B. TAXATION OF "INVESTMENT" INCOME.

It is a well settled concept in the field of state taxation of multistate corporations, that the taxing state is permitted to tax income of the out-of-state corporation as long as it is properly apportioned to the local activities within the taxing state. *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450, 79 S.Ct. 341 (1959). With that point, the Appellant and Appellee agree. However, it is the method of making the proper apportionment which was the issue before the Montana courts. Appellant is a unitary business. It itself admitted that, and it was the finding of both the district court and the Montana Supreme Court. Because Appellant is a unitary business, for tax purposes it concluded that it could not separately account for its income as to its

various mills, plants, refineries, smelters and other places of business, but could only account for its total operating income. Appellant itself has admitted that it used the three-factor formula for apportioning its operating income, but did not apportion what it calls "investment" or "passive" income.

Section 84-1503, R.C.M. 1947, regulating the apportionment of net income, requires one of two methods, either separate accounting of the income from sources within the state, or if such income cannot be segregated, apportionment of the total net income of the corporation. Apportionment is to be made according to regulations prescribed by the Appellee, giving consideration to the factors of payroll, property and sales. The Montana Supreme Court found that only these two methods were allowed under the plain and clear language of the statute and specifically rejected the hybrid method selected by the Appellant to apportion operating income and to separately account for so-called "investment income". Since the income of Appellant's unitary business can not be properly segregated by sources, it must be apportioned to the local activities within the state of Montana, and this the Montana Supreme Court approved.

Appellant argues that since the "investment income" could be segregated as to source, that it must be allocated to its source for tax purposes. On the other hand, the Appellee and the Montana Supreme Court found that this income was business income under the Appellee's regulations, and part of the apportionable income from the unitary operation of the taxpayer.

The Montana Supreme Court's opinion, beginning on page 1a of the Appellant's Appendix, went through the "investment income" item by item listing specifically why the income was business income and fully apportionable. Income which is part of the business operations of the taxpayer, is apportionable. See *Cleveland Cliffs Iron Co. vs. Michigan Corp. and Securities Commission*, 351 Mich. 642, 88 NW 2d 654 (1957) (holding investment portfolio part of business income and apportionable); *Flint vs. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342 (1911); *Great Lakes Pipeline Co. vs. Commissioner of Taxation*, 272 Minn. 403, 138 NW 2d 612 (1965) (holding profits from investments from intangibles became part of apportionable income); *Montgomery Ward Co. Inc. vs. Commissioner of Taxation*, 276 Minn. 479, 151 NW 2d 294 (1967) (value of intangible securities held by corporation held to be apportionable income); *Sperry and Hutchinson vs. Dept. of Revenue*, 270 Or. 329, 527 P.2d. 729 (1974) (company's investment portfolio income includable as apportionable income where used in business).

While the situs of "investment income" can be determined, this court has made it clear that such a test is not determinative of whether the income is taxable by a state. In *Curry vs. McCanless*, 307 U.S. 357, 373, 59 S.Ct. 900 (1939), this court rejected a situs test for the determination of the power to tax under the due process clause, saying:

> "We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all of the complex legal relationships which may be entered into between persons . . .
>
> We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state."

A state in which an intangible is used in business does not enjoy exclusive power to tax the intangible; every state that provides any protection to the intangible or its owners enjoys a similar taxing power. The business income test as adopted in Montana in the regulations of the Department for the purpose of determining whether or not the income of a unitary corporation will be apportioned or allocated, is the test embodied in the Uniform Division of Income for Tax Purposes Act. This Uniform Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1957, and is followed by 28 jurisdictions*.

This test includes as "business income", income arising from the transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the property constitutes an integral part of the taxpayer's regular trade or business operations. If the income does not fall within that definition, then it is allocated to commercial domicile or other situs, according to the terms of the Act. It is whether or not the income arose out of the taxpayer's unitary business operation which determines whether the income will be included in the apportionable income of the taxpayer.

It is important to note that the Montana regulations utilized in determining Appellant's assessments were patterned after the Uniform Division of Income for Tax Purposes Act. Regardless of any practices for the appor-

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*Alabama, Alaska, Arkansas, California, District of Columbia, Colorado, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and W. Virginia.

Source: Commerce Clearing House, Inc., State Tax Guide, p. 1043.

tionment or allocation of income previously adopted in states utilizing this Uniform Act, the Act specifically provides that the first test to be applied to these categories designed by Appellant as "investment income" is whether the income comes within the definition of "business income". Only if the income falls outside of this test does it then become allocable as "nonbusiness income" under the specific allocation provisions of the Uniform Act. The mere fact that it can be called "passive" or "investment income" does not, by itself, determine whether it is to be allocated to commercial domicile or some other specific source, or whether it is to be apportionable income. This point was specifically considered by the Oregon Supreme Court in the *Sperry and Hutchinson* case, *supra*.

The Appellant has pointed out that the inclusion of this income increases the amount of tax the Appellant has to pay. In support of this argument the Appellant cites *Hans Rees' Sons, Inc. vs. North Carolina ex rel Maxwell*, 283 U.S. 123, 51 S.Ct. 358 (1931). The facts of that case are clearly distinguishable. In that instance the evidence showed that the average income having its source in the state of North Carolina was approximately 17%, while the taxing formula of North Carolina allocated approximately 80% of the company's net income to that state. This court found unreasonable and arbitrary the attribution to North Carolina of a percentage of the income out of proportion to the business transacted by the taxpayer in North Carolina. Such is clearly not the fact here. Appellee has required Appellant to apply to its net business income acquired through its unitary business operations the three-factor formula, to apportion to Montana only its share, according to property, payroll and sales in Montana. There has been

no showing that this method of apportionment is unreasonable or in any extent arbitrary.

Appellant argues that allowing the state of Montana to include this "investment income" as part of the apportionable income, raises the possibility of multiple taxation. This Court has made it clear it cannot deal in abstractions, that the burden is on the taxpayer showing that in fact this formula places a burden on interstate commerce and in fact there has been multiple taxation. There is no evidence anywhere in this record on that point and the argument must be rejected. See *Northwestern States Portland Cement Co. vs. State of Minnesota, supra.*

The test of business income provided under the Uniform Act as adopted by the regulations of the Appellee does not create any extra-territorial taxation on the part of Appellee. It is in use by 28 jurisdictions, and is by far the most important factor in creating uniformity of taxation among the several states.

Rather than viewing the inclusion of this business income in apportionable income as a "gross disparity — representing an eleven-fold increase in Appellant's tax liability" (Appellant's Jurisdictional Statement, p. 14), it may more accurately be viewed as overcoming a gross under-reporting by Appellant of income attributable to Montana sources. Appellant's method of reporting was based on first deducting all expenses of earning both what Appellant calls "operating income" and "investment income", to arrive at a federal taxable net income, and then deducting all so-called "investment income", so as to achieve for two of the tax years (1968 and 1970) a negative apportionable income. (Appendix D, pages 18a — 21a.) Because of such practices, the method provided for in the Uniform Act must be used to

fairly attribute income to sources in the states of operation.

The cases cited by the Appellant, page 16, Appellant's Jurisdictional Statement, are not in point. They hold that if the income is *not* part of the unitary business activities of the corporation, it will not be subject to apportionment by a non-domiciliary state. These cases are consistent with the acts taken by the Appellee, the Montana Supreme Court decision, and the Uniform Act. Here the Appellant is unitary, and the income in question is business income, a part of the unitary operation of Appellant, and therefore apportionable.

This Court has previously approved the use of a three-factor formula, as used in this case. *General Motors vs. District of Columbia*, 380 U.S. 553, 85 S.Ct. 1156 (1965). It has approved formulary apportionment of income, *Underwood Typewriter Co. vs. Chamberlain*, 254 U.S. 133, 41 S.Ct. 45 (1920), *Bass Ratcliff and Gretton vs. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82 (1924), *Butler Bros. vs. McColgan*, 315 U.S. 501, 62 S.Ct. 701 (1942), *Northwestern States Portland Cement Co. vs. State of Minnesota, supra*, as long as the income apportioned bears some relation to the activities in the state. In this instance we have apportionment of unitary business income by a three-factor formula which is clearly permissible under the cases cited herein.

C. COMBINATION OF APPELLANT'S INCOME WITH THE INCOME OF CERTAIN OUT-OF-STATE SUBSIDIARIES TO ARRIVE AT THE TOTAL APPORTIONABLE NET INCOME OF THE ECONOMIC UNIT.

Appellant, on page 17 of its Jurisdictional Statement, misstates the nature of the combination of the Appellant

and its six unitary subsidiaries. What the Appellee has done, is to determine the income attributable to Montana sources by apportioning the combined income of Appellant with its unitary affiliates. The use of the combined report as to a group of related corporations engaged in a single unitary business operation is an accounting method designed to arrive at the true net income of an economic unit. It is the logical outgrowth of the unitary concept as applied to the single corporation. The Appellant has admitted (see page 10a of Appellee's Appendix, Opinion of the Supreme Court of Montana) that it is a unitary activity with respect to mining, milling, smelting, refining and sales of the company even though most all of these activities are carried on entirely outside of Montana. Appellant could just as well argue that most of these activities have no visible connection with the smelter operation within Montana, and are earning income outside of Montana's jurisdiction. The admission of Appellant that all such activities are unitary also admits the validity of the unitary concept as applied to the far-flung activities within the corporate shell. What the Appellee has done is to review the total corporate business activities of Appellant and the activities of its controlled corporations and found that Appellant's activities with these affiliated corporations are part of the unitary business activity in the same way as the mining, milling, smelting, and refining activities conducted outside of Montana are within the corporate shell of ASARCO and are unitary.

Appellant's basic argument that combination is inappropriate is two-fold: (i) the subsidiaries in question did not have sufficient contact with Montana to be subject to its taxation jurisdiction; and (ii) Appellant's income could be determined without reference to that of its subsidiaries and therefore there was no authority under 84-

1508 for a combined return. In 1962 Appellant requested permission of Montana to report on the unitary method. By reporting under this method, for many years Appellant has been including as apportionable net income the income from operations completely outside of Montana. Because the determination of net income is, in the first instance, an economic and accounting problem, inclusion of all income from all unitary operations, whether by a division within the corporate shell or by a subsidiary, whether located in or outside Montana's jurisdiction is not only logical, but necessary to determine accurately the total net income to be apportioned to Montana.

The power to require a combined return does not rest with the provisions of Section 84-1508, R.C.M. 1947, nor does it rest with the determination of whether or not the Appellee has any jurisdiction over the related corporations. It comes from the authority of the Appellee to properly determine the income of the taxpayer attributable to the state, Section 84-1503, R.C.M., 1947.

A combined return was first utilized in the State of California over 30 years ago and approved in the case of *Edison California Stores vs. McColgan*, 183 P.2d. 16 (1947).

There was no specific statutory authority in California for combined returns. The California Supreme Court found that the combined return was proper under the statutes:

> "Power to apply the formula apportionment in this or in the Butler Brothers case is not derived from the authority to require the filing of consolidated returns, since the latter indicates that the income of the group will be taxed as a unit. The power flows from the authorized method of ascertaining the

income attributable to a taxpayer's activities within the state; . . .

"The ascertainment of income by the apportionment method is not necessarily a disregard of the corporate entity nor extension of the provisions of the statute by implication. Formula allocation is merely a method of ascertaining the true income attributable to the Plaintiff's business and the method is authorized by statute." *Edison California Stores, supra*, at pp. 21-22.

Oregon has also required the filing of a combined return. See *Zale-Salem, Inc. vs. Tax Commission*, 237 Or. 261, 391 P.2d. 601 (1964), *Coca Cola Co. vs. Department of Revenue*, 271 Or. 517, 533 P.2d. 788 (1975).

To the extent this method of reporting produces an increase in Montana's share of taxable income, it is clearly not based on any assertion of jurisdiction over Appellant's subsidiaries but is based solely on the fact that the Appellant's total net income is derived from conducting unitary activities through the use of separate divisions of the same corporation, and separate wholly owned corporations. The same criteria are utilized in determining if a group of corporations are unitary as in the case of a single corporation with separate divisions. The same result should obtain whether a particular business operation is conducted by a single corporation or a group of related corporations. Taxes, should turn on substance and not form, and this combined report is a valid method of determing the proper apportionable income of the Appellant. In fact, the utilization of the combined report in this instance resulted in the assessment being less than what it would have been had the Appellee not combined the Appellant with these subsidiaries. (Transcript of hearing before Department, October 1, 1973, p. 51). This method is utilized to

determine the proper total net income apportionable to Montana, no matter what the tax consequences.

CONCLUSION

The constitutionality of a Montana statute was not properly raised in this proceeding. Even if constitutional questions may have been raised in the preliminary petition to the Montana Department of Revenue, it is clear that they were abandoned by Appellant and not properly pursued. No substantial federal question has been raised, and therefore whether the Jurisdictional Statement be considered as a Title 28, Sec. 1257(2) appeal or a Section 2103 petition for writ of certiorari, Appellee's Motion to Dismiss on each ground is meritorious and should be granted.

Respectfully submitted,

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APPENDIX A
through
APPENDIX D

APPENDIX A

BEFORE THE
STATE TAX APPEAL BOARD
OF THE
STATE OF MONTANA

IN THE MATTER OF THE PROTEST OF AMERICAN SMELTING AND REFINING COMPANY, a New Jersey corporation, OF PROPOSED DEFICIENCY ASSESSMENTS OF MONTANA CORPORATION LICENSE TAX FOR THE TAXABLE YEARS 1967, 1968, 1969 and 1970

TAXPAYER'S MEMORANDUM

INTRODUCTION

This matter came on regularly for hearing before the Montana State Tax Appeals Board on January 7, 1974, and at that time the Board granted the Taxpayer to and including February 6th, 1974, in which to prepare a Memorandum in reply to the "Brief of Department of Revenue".

ISSUES INVOLVED

From the oral presentation in this matter, it should now be clear to the members of the State Tax Appeal Board that there are only two issues of law still before the Board. First, whether or not under the law the Department of Revenue could combine the Taxpayer and some (but not others) of its affiliated corporations; and, secondly, whether or not income from sources

without the State of Montana were properly reported by the Taxpayer.

CRITICAL ANALYSIS OF THE "BRIEF OF DEPARTMENT OF REVENUE".

We find very little in the brief of the Department of Revenue which requires a reply. The brief is simply a rehash of matters set forth previously in the brief on appeal to the Department of Revenue. The Department of Revenue again takes the position that it is empowered to define the term "unitary business" as it sees fit and having once determined that a taxpayer is "unitary" under its definition, can then proceed to treat all of the income of such a business as subject to apportionment by formula. The Department carries this one step forward and further contends that it can "combine" the income of affiliated corporations without any statutory guidelines.

Of particular significance is the fact that counsel for the Department of Revenue purposefully ignored the case of *Montana Life Insurance Company vs. Shannon*, 106 Mont. 500, 80 P.2d 362, wherein the Montana Supreme Court held that the predecessor section to Section 84-1503, R.C.M. 1947 (previously Section 2297.1, Revised Codes of Montana, 1935), does not come into play where income from "sources within Montana" can be segregated from income from sources "without Montana". Of further significance is the fact that the Department of Revenue has chosen to ignore the newly enacted companion "Corporation Income Tax", and, particularly, Section 84-6903, R.C.M. 1947, which by subsection 2 provides:

> "Income from sources within this state includes income from tangible or intangible property located in or having a situs in this state and income from

> any activities carried on in this state, regardless of whether carried on in intrastate or interstate or foreign commerce."

This latest enactment by the Montana Legislature recognizes that as to intangible properties the old "situs" rules apply.

Section 84-1501, R.C.M., applies the tax to the total net income received by the corporation in the preceding year "from all sources within the State of Montana". Section 84-1503, R.C.M. 1947, provides a rule of apportionment only if the income of a corporation "from sources within the State of Montana cannot be properly segregated from income without the State". Section 84-1504, R.C.M. 1947, provides in pertinent part:

> "The term gross income means the income from all sources within the State of Montana recognized in the determination of the corporation's Federal income tax liability; . . ."

Section 84-1509, R.C.M., defines a unitary business as "one in which the business operations conducted by the corporations in the affiliated group are interrelated or interdependent to the extent that the net income of one corporation cannot reasonably be determined without reference to the operations conducted by the other corporations." Here, the operations of the affiliated corporations which the Department attempts to "combine" with the Taxpayer are separate, are not interrelated or interdependent, and these corporations do not conduct any business within the State of Montana. Federal Metals of Canada conducts all of its business in Canada, cannot file a consolidated return under Federal law, and must file a separate return in Canada. It is impossible to determine by what standards or criteria the Department of Revenue seeks to combine this corporation with

the parent or why the Department has combined some of the affiliates and not others. The Department speaks vaguely of their own definition of a "unitary business" but can point to no statutory authority other than Section 84-1509, R.C.M., which they contend is not controlling.

Most revealing, we feel, was the admission by counsel for the Department at the time of the hearing in this matter that he could not think of one example of "non-business income" under their interpretation of the Uniform Division of Income For Tax Purposes Act.

CONCLUSION

It should be readily apparent to the members of the State Tax Appeal Board that what the Department of Revenue wishes to do with respect to corporations engaged in multistate business is to require such corporations and such of their affiliates as the Department deems proper to report all of the income recognized on their Federal returns and to apportion to Montana by formula all such income. We feel that if the State of Montana is to take such a position, it must be done by legislation. It is submitted that by the use of the term "sources within Montana" with regard to income, the Legislature of the State of Montana has dictated that the rules of situs of income and situs of property are to control and that only where such rules cannot be employed is the apportionment formula to be used. It is quite clear from a reading of the Multistate Tax Compact that under Article 3 the taxpayer has an option to either rely on the rules of situs of income and situs of property or to use the modified rule of the Uniform Division of Income For Tax Purposes Act.

Accordingly, the manner in which the Taxpayer reported its income and the fact that it did not report the income of any of its affiliated corporations was proper and the deficiency assessments based thereon by the Department of Revenue should be set aside.

DATED this 6th day of February, 1974.

AMERICAN SMELTING AND REFINING COMPANY, a New Jersey corporation

ALEXANDER J. GILLESPIE, JR., Vice President and General Counsel
120 Broadway
New York, New York 10005

HUGHES, BENNETT & CAIN
By George T. Bennett
406 Fuller Avenue
P. O. Box 1166
Helena, Montana 59601
ATTORNEYS FOR TAXPAYER

CERTIFICATE OF SERVICE BY MAIL

I, GEORGE T. BENNETT, one of the attorneys for Taxpayer in the above-entitled matter, DO HEREBY CERTIFY that on the 6th day of February, 1974, I served the foregoing TAXPAYER'S MEMORANDUM, by depositing true copies thereof in the United States Mails at Helena, Montana, on said day, securely enclosed in sealed envelopes, with first class certified postage prepaid thereon, one of said envelopes being addressed to each of the following:

Mr. Vernon B. Miller
Administrative Secretary
State Tax Appeal Board
of the State of Montana
1400—11th Avenue
Helena, Montana 59601

and

Mr. Terry B. Cosgrove
Tax Counsel
Department of Revenue
State of Montana
Mitchell Building
Helena, Montana 59601

those being the last known addresses of said persons.

/s/George T. Bennett

APPENDIX B

Rule 34. Petitions for rehearing. When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 13249

MONTANA DEPARTMENT OF REVENUE, State of Montana, *Petitioner-Appellant*,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, *Defendant-Respondent*.

BRIEF OF THE AMERICAN SMELTING AND REFINING COMPANY (ASARCO) IN OPPOSITION TO THE MOTION OF THE MULTISTATE TAX COMMISSION TO PARTICIPATE AS AMICUS CURIAE

Ordinarily an Amicus Curiae motion is not and should not be a contested matter. However, in this particular instance it is ASARCO's attorney's firm conviction and belief that William D. Dexter's Amicus Curiae request on behalf of the Multistate Tax Commission is a sham and a clear abuse of the Montana Rules of Appellate Civil Procedure.

Rule 24 of the Montana Rules of Appellate Civil Procedure requires that an Amicus Curiae motion "shall identify the interest of the applicant." In purported satisfaction of this requirement Mr. Dexter has alleged in his motion that the Multistate Tax Commission's audit of ASARCO "is the subject matter of this litigation," that the Commission's "work product is brought

into controversy by this litigation," and that his participation is necessary so that "comparable laws of the member states [of the Commission] . . . be given a uniform interpretation." These allegations, however, bear little resemblance to the actual issue before this Court on the appeal by the Department of Revenue from the District Court's decision in favor of ASARCO.

It is true that the audit which formed the basis of this litigation was conducted by the Multistate Tax Commission. But this fact has no bearing whatsoever on the issue on appeal herein. There never was any question in this case as to the audit information. Thus, the issue on appeal does not relate to the validity of the mechanics of the audit. Rather, the issue on the Department's appeal concerns the time at which the principles of UDITPA became effective in Montana. This issue, ASARCO submits, is solely and exclusively one of Montana law, in which the Multistate Tax Commission has not one bit of interest and with respect to which there is no need whatsoever for "uniform interpretation and application by the member states" of the Multistate Tax Commission.

The sham nature of the Multistate Tax Commission's Amicus Curiae motion rests on the fact that William D. Dexter has been appointed a Montana Special Assistant Attorney General for the Montana Department of Revenue for a controversy between the Department of Revenue and W. R. Grace and Company, in which the central issue, as in this case, is the effective date of UDITPA in Montana. In fact, there is presently under submission in the District Court of the First Judicial District a Motion for Summary Judgment by W. R. Grace which is opposed by William D. Dexter, as attorney for the Department of Revenue. The question in the W. R. Grace litigation is whether under the District Court's

decision in this case certain interrogatories based on UDITPA are relevant, in light of the District Court's decision in this case that UDITPA was not applicable during the tax years in question.

As previously noted, there is no real interest on behalf of the Multistate Tax Commission in the issue on this appeal, which concerns the effective date of UDITPA in Montana. In light of the fact that William D. Dexter is an attorney for the Department of Revenue with respect to the W. R. Grace litigation, which involves the same issue with respect to the effective date of UDITPA, it is clear that Mr. Dexter's request to participate in this appeal as Amicus Curiae is nothing more than an attempt to give the Department of Revenue the opportunity to in effect submit two briefs in support of its appeal. This, ASARCO submits, is a patent abuse of the Montana Rules of Appellate Civil Procedure. If, as Mr. Dexter claims, he would be able to "be of aid to the Court in properly resolving the issues in this litigation", then the proper channel for his input is through his fellow Department of Revenue Counsel who are handling the ASARCO appeal, and not, as has been requested, through the sham medium of an Amiens Curiae brief on behalf of the Multistate Tax Commission.

As this Court said in *State ex rel. Bennett v. Bonner, Gov.*, 123 Mont. 414, 420-21, 214 P.2d 747 (1950):

> "An 'amicus curiae' literally meaning a friend of the court is a person, whether attorney or layman, who, as a standerby, when a judge is doubtful or mistaken, may upon leave granted in a case then before him, inform the court as to facts or situations that may have escaped consideration or remind the court of a legal matter which has escaped its notice and regarding which it appears to be in danger of going wrong.

> The right to be heard as amicus curiae is within the discretion of the court and is in nowise dependent upon the consent of the parties to the proceeding.
>
> An amicus curiae may be appointed by the court sua sponte or he may appear by leave of court. An amicus curiae is not a party to the action, — he has no control over the proceedings, — he must take the case as he finds it, and under the rule that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute, an amicus curiae has no right to question the constitutionality of an act and the court will not pass on grounds of invalidity urged by an amicus curiae but not presented by the parties.
>
> The statements of an amicus curiae are to be weighed and tested like other evidence, and it is within the discretion of the court as to whether it will accept the advise or suggestions of an amicus curiae."

Here Mr. Dexter is not "a standerby" but a partisan advocate and attorney for the Department of Revenue who can and should be required to participate in the presentation of this matter by cooperating with his fellow attorneys for the Department. There has been more than ample opportunity for his participation in the brief of the Department. The Department should not be allowed by this sham to file two briefs (especially since it has already, with permission, exceeded the allowed brief length).

In any event, even if the Court should allow Mr. Dexter to participate as Amicus Curiae, it would only be fair, in light of Mr. Dexter's position with the Department with respect to the W. R. Grace litigation, that the Court further order that ASARCO's brief on this appeal

shall not be due until 30 days after service of the Amicus Curiae brief. ASARCO submits that such an order is the only way by which it could be given some measure of protection from the "two briefs" technique attempted by the Department in this case.

Finally, it should be noted that Mr. Dexter has requested leave to participate in oral argument as Amicus Curiae. Rule 24 expressly requires that such leave "will be granted only for extraordinary reasons". ASARCO submits that even if the Court should grant leave for an Amicus brief on behalf of the Multistate Tax Commission, Mr. Dexter's motion clearly does not present "extraordinary reasons" which would justify his participation in oral argument.

For the foregoing reasons ASARCO respectfully submits that (1) the Multistate Tax Commission's motion for leave to participate in this appeal as Amicus Curiae should be denied, or (2) in any event, if leave to participate as Amicus Curiae is granted to the Multistate Tax Commission, then the time at which ASARCO's brief on appeal is due should be extended to 30 days after service of the Amicus brief, and, in addition, counsel for the Multistate Tax Commission should not be permitted to participate in oral argument as Amicus Curiae. A proposed order is attached.

DATED this 12th day of May, 1976.

HUGHES, BENNETT & CAIN
STUART L. KELLNER
JOHN F. SULLIVAN

/s/George T. Bennett
406 Fuller Avenue
P. O. Box 1166
Helena, Montana 59601

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 13249

MONTANA DEPARTMENT OF REVENUE, State of Montana, *Petitioner-Appellant*,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, *Defendant-Respondent*.

AFFIDAVIT OF GEORGE T. BENNETT IN SUPPORT OF BRIEF OF ASARCO IN OPPOSITION TO THE MOTION OF THE MULTISTATE TAX COMMISSION TO PARTICIPATE AS AMICUS CURIAE

George T. Bennett, being first duly sworn, deposes and says:

1. He is the counsel of record for ASARCO in the above-entitled matter, and, in addition, is the counsel of record for W. R. Grace and Company in *W. R. Grace and Company vs. The Montana Department of Revenue*, First Judicial District Civil Number 38977.

2. William D. Dexter, who has petitioned for leave to participate as Amicus Curiae in the above-entitled matter, was on March 21, 1975 appointed as a Special Assistant Attorney General for the State of Montana for the purpose of handling the controversy referred to above between the Department of Revenue and W. R. Grace and Company.

3. There is currently under submission in the First Judicial District, in Civil Action Number 38977, a motion for summary judgment by W. R. Grace by which

W. R. Grace contends that it need not answer certain interrogatories served by William D. Dexter in conjunction with the W. R. Grace controversy. The Department has admitted that these interrogatories are all based on UDITPA. W. R. Grace has contended, *interalia*, that the interrogatories are irrelevant because, according to the District Court's decision in this case, UDITPA was not effective in Montana during the tax years in question.

4. The legal question on the appeal in this case is identical to that involved in the W. R. Grace litigation, which, from the outset, has been handled by William D. Dexter, who has petitioned for leave to participate as Amicus Curiae in this case on behalf of the Multistate Tax Commission.

5. At the time of William D. Dexter's appointment as a Special Assistant Attorney General for Montana, in March, 1975, this case was pending in the District Court of the First Judicial District, and the parties were then in the process of preparing and filing briefs in support of their respective positions. This case was not taken under submission by the District Court until late in November, 1975, and was not finally decided by the District Court until December 17, 1975. The Department of Revenue's opening brief on this appeal was first due in February, 1976. However, the Department requested and obtained three extensions of time and its opening brief was not filed until April 22, 1976. During this time William D. Dexter was fully aware of the District Court decision and the appeal in this matter. Nevertheless, Mr. Dexter's request for leave to participate as Amicus Curiae was not filed with this Court until May 10, 1976.

DATED this 12th day of May, 1976.

George T. Bennett

SUBSCRIBED and sworn to before me this 12th day of May, 1976.

Donna S. Muffick
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission Expires July 21, 1978

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 13249

MONTANA DEPARTMENT OF REVENUE, State of Montana, *Petitioner-Appellant*,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, *Defendant-Respondent*.

ORDER DENYING THE MULTISTATE TAX COMMISSION'S MOTION TO PARTICIPATE AS AMICUS CURIAE

A Motion having been made by William D. Dexter, Special Assistant Attorney General for the State of Montana and General Counsel for the Multistate Tax Commission, and opposition having been filed by the American Smelting and Refining Company, Defendant-Respondent, and due consideration having been given to said motion and opposition,

IT IS HEREBY ORDERED that the motion of the Multistate Tax Commission for leave to participate as Amicus Curiae in the above-captioned action be and the same is hereby denied.

DATED this _____ day of May, 1976.

CHIEF JUSTICE

CERTIFICATE OF SERVICE BY MAIL

I, GEORGE T. BENNETT, one of the attorneys for Defendant-Respondent AMERICAN SMELTING AND REFINING COMPANY in the above-entitled action do hereby certify that on the 12th day of May, 1976, I served the attached BRIEF OF ASARCO IN OPPOSITION TO THE MOTION OF THE MULTISTATE TAX COMMISSION TO PARTICIPATE AS AMICUS CURIAE, AFFIDAVIT OF GEORGE T. BENNETT, and PROPOSED ORDER, by depositing true copies thereof in the United States Mails at Helena, Montana, on said day, securely enclosed in three sealed envelopes, with first class postage prepaid thereon, said envelopes being addressed to each of the following:

Theodore W. de Looze
Special Assistant Attorney General
Department of Justice
State Office Building
Salem, Oregon 97310

Terry B. Cosgrove
Special Assistant Attorney General
P. O. Box 1144
Helena, Montana 59601

the attorneys for Petitioner-Appellant, Montana Department of Revenue, State of Montana; and

William D. Dexter
Attorney at Law
Bank of Olympia Building
Olympia, Washington 98501

the attorney for the Multistate Tax Commission; these being the last known addresses of said attorneys.

/s/George T. Bennett

APPENDIX D

NO. 37750

IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

MONTANA DEPARTMENT OF REVENUE, STATE OF MONTANA, *Petitioner-Appellant*,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, *Defendant-Respondent*.

APPELLANT'S BRIEF

Appellant's Brief on Appeal from the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark.

(Material on pp. 1-7 of original document omitted).

In arriving at its total net income, ASARCO deducted as business expenses all expenses attributable to the production of dividends, interest, royalties, rents and gains from the sale of property, rather than attributing such expenses to the production of such income. For example, ASARCO maintains company housing at some of its mines. The costs of such housing, such as depreciation, taxes, interest, management, maintenance and repairs were deducted as business expenses from general operating expenses: Thus, Montana's share of apportionable net income was reduced twice, under ASARCO's

method, once by deducting such expenses, and then by deducting the gross rentals which recovered such expenses.

As shown by ASARCO's Montana tax returns (Ex. "A" through "D"), the tax computations were:

1967

Federal Taxable Income	$60,527,768
Nonbusiness Income Deducted	45,169,221
Apportionable Income	$15,358,547

Apportionable income (or loss) was apportioned to Montana by a three-factor formula to determine the percentage attributable to Montana sources:

$$\frac{\text{Montana Property}}{\text{Property Everywhere}} + \frac{\text{Montana Payroll}}{\text{Payroll Everywhere}} + \frac{\text{Montana Sales}}{\text{Sales Everywhere}} = \text{_____}\%$$

Averaged by dividing by 3

Montana percentage (1.7674) x $15,358,547 =	$	271,447
Income from Montana securities allocated to Montana		6,385
Net Income from Mon- Sources	$	277,832

	1968		
Federal taxable income	$ 62,531,929		
Nonbusiness income deducted	62,548,620		
Apportionable loss	(16,691)		
Loss apportioned to Montana	(307)	(1.8367%)	
Income from Montana securities allocated to Montana	7,288		
Net income from Montana Sources.....	$ 6,981		
	1969		
Federal taxable income	$ 92,480,382		
Nonbusiness income deducted	76,869,974		
Apportionable income	15,610,408		
Income apportioned to Montana	302,982	(1.9409%)	
Income from Montana securities allocated to Montana	3,082		
Net income from Montana Sources.....	$ 306,064		
	1970		
Federal taxable income	$115,219,427		
Nonbusiness income deducted	115,584,872		
Apportionable loss	(365,445)		
Loss apportioned to Montana	(7,324)	(2.0042%)	
Income from Montana securities allocated to Montana	4,903		
Net loss from Montana Sources.....	$ (2,421)		

(Material on pp. 10-53 of original document omitted).

Respectfully submitted,

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